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Basis Of Liability In Fireworks Accidents

class of property owners at the expense of all the taxpayers.[32] If the answer is in the negative, the abutting owner's rights will only be another of those individual rights which have been curtailed for the benefit of the state.

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BASIS OF LIABILITY IN FIREWORKS ACCIDENTS

In tort actions where injuries are sustained by alleged mishandling of fireworks, compulsory nonsuits should be entered in Pennsylvania only when it is clear that the party or parties suing have failed to prove their case, and only when they have had the benefit of all the evidence and inferences favorable to their cause of action.[1] The question of whether a compulsory nonsuit should be lifted when the evidence was insufficient to present a question for the jury was the subject of a recent appellate case of first impression in Pennsylvania.

Haddon v. Lotito[2] was an action for personal injuries suffered at a fireworks display produced by the defendant at a public park. The plaintiffs visited the park to see the fireworks display and stood with other spectators approximately one thousand feet away from where the fireworks were set off. Testimony revealed that some of the rockets failed to reach sufficient height and fell into the crowd where they exploded injuring the plaintiffs.[3] The trial court held that the plaintiffs had failed to make a prima facie case as to the defendant's negligence, and entered a nonsuit. The Supreme Court affirmed that decision, with two judges dissenting.[4]

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[32]Levin, Federal Aspects of the Interstate Highway Program, 38 Neb. L. Rev. 377 (1959). This article gives a view of the tremendous amount of money needed to carry out this program on the federal-state cooperation level.

[1]Borzik v. Miller, 399 Pa. 293, 159 A.2d 471 (1960); Taylor v. Philadelphia Parking Authority, 398 Pa. 9, 156 A.2d 525 (1959); Gift v. Palmer, 392 Pa. 628, 141 A.2d 408 (1958); Schofield v. King, 388 Pa. 132, 130 A.2d 93 (1957); Finnin v. Neubert, 378 Pa. 40, 105 A.2d 77 (1954).

[2]399 Pa. 521, 161 A.2d 160 (1960).

[3]Id. at 163. One of the plaintiffs testified, " '[T]hey [the rockets] just thumped and busted all over and some of them hit the ground in among us and busted .... Some of them, instead of going away up ... they just went up a little way, part way up, and then they came right back down and started busting among us .... They seemed to be getting lower and lower instead of staying high .... Some of them already hit in front of us on the ground and people were hollering and crying and screaming. Finally, someone yelled, Run: they are going to hit the ground'."

[4]Id. at 164. Judge Musmanno, writing the dissenting opinion in which Judge Bok concurred, stated that: "A person who is invited to a pyrotechnical performance has the right to expect that he will not be shot at with Roman candles, that sky

The dissenting judges felt that the nonsuit should have been lifted and the defendant held accountable. They drew an analogy between the injuries suffered in the present case and those of an innocent pedestrian who is knocked down by an automobile. In the latter situation the fact that the automobile was where it had no right to be would place upon the driver the burden of explaining how and why the accident occurred.

The plaintiffs maintained that the defendant's liability could be based on any one of three theories: (1) absolute liability; (2) exclusive control; and (3) direct proof of negligence.

If the doctrine of absolute liability is applicable the defendant is liable for any harm that results from an ultrahazardous activity, even though the utmost care has been exercised.[5] This doctrine has generally been applied to activities such as blasting.[6] Most of the jurisdictions which have considered whether the doctrine extends to fireworks exhibitions have denied absolute liability by requiring some positive proof of negligence.[7] Other jurisdictions have imposed absolute liability, but in each case the fireworks display was either illegal or in the nature of a nuisance.[8] Therefore, the majority in the instant case was justified in denying recovery to the appellants on a theory of absolute liability. Pennsylvania has adopted the view of the

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rockets will not drop on his head, that aerial bombs will not explode under his feet and that pin wheels will not roll to his immediate vicinity and there revolve to his disaster." The dissenting judges would therefore have held the defendant legally accountable because, "it is actionable negligence so to fire bombs that they will fall on a spectator standing where he is expected to stand to view a display of fireworks." Id. at 165. These words first appeared in the case of Sroka v. Halliday, 39 R.I. 119, 97 Atl. 965 at 974 (1916), wherein a minor was injured when he found an unexploded bomb and brought it to his home where it exploded. The court felt that it was a question for the jury whether the defendants took the necessary precautions to prevent injury to persons and property when they permitted the unexploded bombs to fall and remain unrecovered until found by a child.

[5]See note 9 infra; Restatement, Torts § 519 (1938).

[6]Federoff v. Harrison Constr. Co., 362 Pa. 181, 66 A.2d 817 (1949). Restatement, Torts § 520, comment c. (1938).

[7]Waixel v. Harrison, 37 Ill. App. 323 (1890); Blue Grass Fair Ass'n v. Bunnell, 206 Ky. 462, 267 S.W. 237 (1924); Shannon v. Dow, 133 Me. 235, 175 Atl. 766 (1934); Colvin v. Peabody, 155 Mass. 104, 29 N.E. 59 (1891); Dowell v. Guthrie, 99 Mo. 653, 12 S.W. 900 (1890); Bianki v. Greater Am. Exposition Co., 92 N.W. 615 (Neb. 1902); Robinson v. Unexcelled Mfg. Co., 104 N.J.L. 589, 141 Atl. 802 (1928); Crowley v. Rochester Fireworks Co., 183 N.Y. 353, 76 N.E. 470 (1906); Sroka v. Halliday, 39 R.I. 119, 97 Atl. 965 (1916).

[8]Gerrard v. Porcheddu, 243 Ill. App. 562 (1927); Moore v. City of Bloomington, 51 Ind. App. 145, 95 N.E. 374 (1911); Doughty v. Atlantic City Business League, 79 N.J. Eq. 165, 80 Atl. 473 (1911); Landau v. City of New York, 180 N.Y. 48, 72 N.E. 631 (1904); Harris v. City of Findlay, 59 Ohio App. 375, 18 N.E.2d 413 (1938).

Restatement of Torts, called the ultrahazardous activity approach,[9] Although this rule was not accepted in that state without some controversy.[10]

The second theory of recovery advanced by the plaintiffs was that of exclusive control, which the Pennsylvania Supreme Court also held inapplicable. The exclusive control doctrine is "more or less peculiar to Pennsylvania in accident cases."[11] It is a first cousin of the more traditional doctrine of *res ipsa loquitur,*[12] which in Pennsylvania is restricted to situations in which there is a contract between the parties.[13] The exclusive control doctrine was first adopted in *Shafer v. Lacock,*[14] when the court said:

> "The accident, the injury, and the circumstances under which they occurred, are in some cases sufficient to raise a presumption of negligence, and thus cast on the defendant the burden of establishing his freedom from fault. When the thing which causes the injury is shown to be under the management of defendants, and the accident is such as, in the ordinary course of things does not happen if those who have the management use

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[9]Restatement, Torts § 519 (1938): "Except as stated in § 521-4, one who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm."

Restatement, Torts § 520 (1938): "An activity is ultrahazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage."

[10]The three recognized rules of law which are applicable to situations involving liability for the escape of substances from land are (1) the English rule of Rylands v. Fletcher, L.R. 1 Ex. 265, L.R. 3 H.L. 330 (1868), (2) the absolute nuisance doctrine, and (3) the Restatement rule.

Pennsylvania has specifically rejected the doctrine of Rylands v. Fletcher. Waschak v. Moffat, 397 Pa. 441, 109 A.2d 310 (1954); Summit Hotel Co. v. National Broadcasting Co., 336 Pa. 182, 8 A.2d 302 (1939); Venzel v. Valley Camp Coal Co., 304 Pa. 583, 156 Atl. 240 (1931); Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 6 Atl. 453 (1886). In place of the rule of Rylands v. Fletcher the court applied the absolute nuisance doctrine. Venzel v. Valley Camp Coal Co., 304 Pa. 583, 156 Atl. 240 (1931); Householder v. Quemahoning Coal Co., 272 Pa. 78, 116 Atl. 40 (1922); Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 6 Atl. 453 (1886).

Pennsylvania's acceptance of the Restatement rule is best described in Waschak v. Moffatt, 379 Pa. 441, 109 A.2d 310 (1954). See generally, 95 U. Pa. L. Rev. 781 (1947).

[11]Loch v. Confair, 372 Pa. 212, 93 A.2d 451, 453 (1953).

[12]Kotal v. Goldberg, 375 Pa. 397, 100 A.2d 630, 636 (1953).

[13]Loch v. Confair, 372 Pa. 212, 93 A.2d 451 (1953); Maltz v. Carter, 311 Pa. 550, 166 Atl. 852 (1933). See also, Sierocinski v. E. I. Du Pont de Nemours & Co., 118 F.2d 531 (3d Cir. 1941).

[14]168 Pa. 497, 32 Atl. 44 (1895).

> proper care, it affords reasonable evidence, in the absence of the explanation by the defendants, that the accident arose from want of care."[15]

The doctrine has been applied to many varying factual situations,[16] but more recently it has been restricted[17] and not given as broad an interpretation as the *Shafer* case indicated. This observation is borne out by the 1953 case of *Kotal v. Goldberg*,[18] in which Judge Bell in a concurring opinion enumerated all the elements necessary to invoke the exclusive control doctrine. First, the thing that caused the accident must have been under the defendant's control or manufactured by him, and the situation must have been such that the accident would not have occurred if the defendant had exercised due care. Secondly, the evidence as to the cause of the accident must have been within the possession of the defendant and not equally available to both parties. Thirdly, the accident itself must have been unusual, and finally, the facts must be such that general principles of negligence are not applicable.[19]

When applicable, the effect of this doctrine is to place upon the defendant the burden of rebutting an inference of negligence.[20] Subsequent cases show that the literal interpretation of the doctrine as first applied in *Shafer v. Lacock*[21] has been restricted to those situations in which the accident is unusual, the defendant is peculiarly or exclusively[22] in possession of the evidence of its cause, and the accident is of such a nature that it probably would not have occurred unless negligence existed.[23] The court held in the instant case that all the requirements necessary for application of the exclusive control doctrine were not met since the accident could just as well have been caused by latent defects in the fireworks themselves.

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[15]Id. at 46.

[16]Mack v. Reading Co., 377 Pa. 135, 103 A.2d 749 (1954); Loch v. Confair, 372 Pa. 212, 93 A.2d 451 (1953); Commonwealth v. Montour Transp. Co., 365 Pa. 72, 73 A.2d 659 (1950); Skeen v. Stanley Co., 362 Pa. 174, 66 A.2d 774 (1949); Durning v. Hyman, 286 Pa. 376, 133 Atl. 568 (1926); East End Oil Co. v. Pennsylvania Torpedo Co., 190 Pa. 350, 42 Atl. 707 (1899); Shafer v. Lacock, 168 Pa. 497, 32 Atl. 44 (1895); Cross v. Laboda, 190 Pa. Super. 119, 152 A.2d 792 (1959); Dillon v. Williams S. Scull Co., 164 Pa. Super. 365, 64 A.2d 525 (1949).

[17]Kotal v. Goldberg, 375 Pa. 397, 100 A.2d 630 (1953); Ebersole v. Beistline, 368 Pa. 12, 82 A.2d 11 (1951); Miller v. Hickey, 368 Pa. 317, 81 A.2d 910 (1951); Martin v. Marateck, 345 Pa. 103, 27 A.2d 42 (1942); Veneziale v. Carr, 191 Pa. Super. 30, 155 A.2d 638 (1959).

[18]375 Pa. 397, 100 A.2d 630 (1953).

[19]Id. at 641.

[20]Mack v. Reading, supra note 16.

[21]168 Pa. 497, 32 Atl. 44 (1895).

[22]Kotal v. Goldberg, supra note 19.

[23]Ibid.

The rejection of the exclusive control doctrine did not preclude the plaintiffs from employing a general negligence theory, and the court's rejection of his first two grounds of recovery forced him to proceed upon this theory. Under general rules of negligence, unlike in the absolute liability and exclusive control theories, the happening of the accident is no indication of the defendant's negligence because negligence is never presumed from the mere happening of an accident.[24] To avoid liability the defendant must use the care of a reasonably prudent man under like circumstances to protect spectators from injury.[25] As stated in the Missouri case of *Dowell v. Guthrie*,[26] "Where the injury is unintentional, and is inflicted in the doing of a lawful act, there can be no recovery ... except by showing negligence on the part of the defendant; and the burden of proof ... is upon the plaintiff."[27] In that case the defendants were found to have been smoking cigars near a large quantity of fireworks which exploded and injured the plaintiff. The court held in the *Dowell* case that the carelessness in the defendants' handling of the fireworks was sufficient to let the case go to the jury.[28] Other jurisdictions permit this type of case to go to the jury only after the plaintiff has shown his own due care as well as some evidence of the defendant's negligence.[29] However, it seems obvious that one handling fireworks or dangerous explosives must exercise a higher standard of care than that required in normal activities.[30] In *Deyo v. Kingston Consol. Ry.*[31] the court held that the defendant was under a duty to prohibit spectators from coming close when it was known or should have been known that a dangerous condition existed.[32] Moreover, it has been held to be a jury

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[24] Gift v. Palmer, 392 Pa. 628, 141 A.2d 408 (1958); Schofield v. King, 388 Pa. 132, 130 A.2d 93 (1957); Brusis v. Henkels, 376 Pa. 226, 102 A.2d 146 (1954); Finnin v. Neubert, 378 Pa. 40, 105 A.2d 77 (1954); Lanni v. Pennsylvania R.R., 371 Pa. 106, 88 A.2d 887 (1952).

[25] Ibid. See also, Sebeck v. Plattdeutsche Volkfest Verein, 64 N.J.L. 624, 46 Atl. 631 (1900).

[26] 99 Mo. 653, 12 S.W. 900 (1890).

[27] Id. at 902.

[28] The court also said, "The discharge of fireworks at suitable places, when not prohibited by statute or municipal regulations, cannot be said to be unlawful; but the circumstances may be such as to make the act of discharging an explosive culpable negligence." Id. at 901.

[29] Colvin v. Peabody, 155 Mass. 104, 29 N.E. 59 (1891); Dowell v. Guthrie, 99 Mo. 653, 12 S.W. 900 (1890); Robinson v. Unexcelled Mfg. Co., 104 N.J.L. 589, 141 Atl. 802 (1928); Crowley v. Rochester Fireworks Co., 183 N.Y. 353, 76 N.E. 470 (1906).

[30] Bianki v. Greater Am. Exposition Co., 92 N.W. 615, 617 (Neb. 1902).

[31] 94 App. Div. 578, 88 N.Y.S. 487 (3d Dep't 1904).

[32] Id. at 490.

question "whether the exhibition was properly segregated from the spectators, and whether the explosives were of such a character as to render them intrinsically dangerous considering the manner in which they were intended to be used."[33] In the New Jersey case of *Sebeck v. Plattdeutsche Volkfest Verein*[34] involving facts similar to those in the instant case, the court held that the defendant was not relieved from liability because he hired an independent contractor to set off the display. "Having invited the public to its park, it was chargeable with the duty of using reasonable care to see that the premises were kept in a safe condition for the use of its guests."[35] From the evidence presented in that case the court concluded that the defendant did everything possible to make the area safe, thereby relieving himself from liability. Similarly, it was held in *Reisman v. Public Serv. Corp.*[36] that the management of an exhibition is not negligent when the only further precaution he could have taken would have been to place the spectators too far away to observe properly the display.[37] The court pointed out that in the *Sebeck* case the spectators were only *one hundred feet* from the exhibition while in *Reisman* the spectators were *three* to *four hundred feet* away. These two New Jersey decisions indicate that the defendant in the principal case was not negligent, in as much as the plaintiffs were approximately *one thousand feet* away from the exhibiting area.[38]

There was nothing in the situation to give rise to a suspicion that the fireworks were likely to cause injury, and the defendant may be said to have used reasonable care to keep the spectators away from the exhibition area. If a barrier had been erected to protect the plaintiffs from an occurrence such as this, the object of the display

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[33]Blue Grass Fair Ass'n v. Bunnell, 206 Ky. 462, 267 S.W. 237, 240 (1924).

[34]64 N.J.L. 624, 46 Atl. 631 (1900). This case was also brought in the federal courts subsequent to the nonsuit by the New Jersey Court of Appeals. The case reached the Court of Appeals for the Second Circuit upon a writ of error to review a judgment rendered in favor of the defendant by the United States District Court for the Southern District of New York. Sebeck v. Plattdeutsche Volkfest Verein, 124 Fed. 11 (2d Cir. 1903), cert. denied, 194 U.S. 634 (1904). The federal court reviewed the trial court's instructions to the jury and sustained them. "Under those circumstances it was incumbent upon the defendant to use the care and prudence which would have been exercised by an ordinary prudent and intelligent man to protect him, and to protect the others who were there, from unnecessary risks." Id. at 14, quoting with approval an instruction given in the District Court. Plaintiff's contention that defendant owed a higher duty than ordinary care was overruled and he was nonsuited again.

[35]64 N.J.L. 624, 46 Atl. 631, 632 (1900).

[36]82 N.J.L. 464, 81 Atl. 838 (1911).

[37]Id. at 839.

[38]Haddon v. Lotito, 399 Pa. 521, 161 A.2d 160, 163 (1960).

would have been largely defeated.[39] The majority of the court therefore decided that there was insufficient evidence to show defendant's negligence, even when the plaintiffs were given the benefit of all favorable inferences. When the plaintiff failed to prove the defendant's lack of due care, he subjected himself to a nonsuit.

Although it was not necessary to its decision, the court mentioned the problem presented by the doctrine of assumption of the risk as applied to the plaintiffs. In the case of *Scanlon v. Wedger*[40] it was said that "a voluntary spectator, who is present merely for the purpose of witnessing the display, must be held to consent to it, and he suffers no legal wrong if accidentally injured without negligence on the part of anyone, although the show was unauthorized. He takes the risk."[41] There was a strong dissent in the *Scanlon* case which considerably weakens the decision. In the majority of cases dealing with injuries from fireworks, the contention that the injured party assumed the risk has been rejected as a matter of law.[42]

It appears that Pennsylvania has adopted a conservative approach as to the applicability of the doctrines of absolute liability, exclusive control, and assumption of risk in cases involving injuries sustained by spectators at fireworks displays. In that jurisdiction the situation is governed under general negligence theories, and the plaintiff's failure to carry the burden of proving the defendant's lack of due care will result in an involuntary nonsuit.

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[39]Sebeck v. Plattdeutsche Volkfest Verein, 64 N.J.L. 624, 46 Atl. 631, 632 (1900).
[40]156 Mass. 462, 31 N.E. 642 (1892).
[41]Ibid. But see, Annot. 24 A.L.R. 766 (1923).
[42]Moore v. Bloomington, 51 Ind. App. 145, 95 N.E. 374 (1911); Colvin v. Peabody, 155 Mass. 104, 29 N.E. 59 (1891); Dowell v. Guthrie, 99 Mo. 653, 12 S.W. 900 (1890).